

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 16, 2008 Session

JILL MICHELLE FLOYD
v.
JOHN STEPHEN FLOYD

Appeal from the Circuit Court for Wilson County
No. 5311-DVC Clara W. Byrd, Judge

No. M2007-02420-COA-R3-CV - Filed December 30, 2008

This is a divorce case. The parties were married for nineteen years and had three children, one of whom was a minor at the time of the divorce. The husband is a pilot with an irregular work schedule. On the first day of trial, the parties announced that they had reached an agreement concerning distribution of the marital property. On the third day of trial, the wife filed a motion to alter or amend the order distributing the marital estate, alleging that she had been mistaken about the value of the parties' interest in a piece of real property when she agreed to the division of property. The trial court denied the wife's motion to alter or amend. After granting a divorce to both parties, the trial court designated the wife as the primary residential parent and ordered that the husband would have a certain number of days of residential parenting time each month, to be selected by the husband at his discretion due to his irregular work schedule. The trial court denied the wife's request for alimony, finding that she did not need alimony and that the husband could not afford to pay it. The trial court also denied the wife's request for attorney's fees. The wife appeals. We affirm, finding that permitting the husband to choose his residential parenting days was not an abuse of discretion under the circumstances, that the trial court did not err in denying the wife's request for alimony or attorney's fees, and that the trial court did not err in denying the wife's Rule 60.02 motion to amend the order on division of the marital estate.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which J. STEVEN STAFFORD, J., and WALTER C. KURTZ, SP. J., joined.

Stephen W. Pate, Murfreesboro, Tennessee, for the Plaintiff/Appellant, Jill Michelle Floyd

Melanie R. Bean, Lebanon, Tennessee, for the Defendant/Appellee, John Stephen Floyd

OPINION

FACTS AND PROCEDURAL HISTORY

Plaintiff/Appellant Jill Michelle Floyd (“Wife”) and Defendant/Appellee John Stephen Floyd (“Husband”) were married in March 1987, and have three children together, Christopher (born 5/10/88), Ashlyn (born 7/17/89), and Austin (born 8/02/95). Husband has been a pilot with Northwest Airlines for over twenty years. Wife attended one semester of college in Iowa, where she grew up. After that, she went into the travel industry and attended a six-month specialized travel school in Minnesota. She worked fairly consistently, at least part-time, in a variety of travel or hotel-related positions. At the agreement of the parties, she periodically cut back or temporarily stopped work outside the home when the two older children were very young.

During most of the parties’ marriage, the family lived in Minnesota. In 2001, the parties separated for a time, and then reconciled. Thereafter, in approximately 2002, the family moved to Wilson County, Tennessee, where Husband has extended family. They purchased a large home in Wilson County on nearly three acres, with a pool and a pool house. The parties retained ownership of undeveloped property in Minnesota, and contracted with a local worker to maintain it. In Tennessee, in addition to working as a pilot, Husband raised cattle through the parties’ cattle company, the Twin Oaks Cattle Company.

Unfortunately, the marriage again deteriorated, with Wife accusing Husband of infidelity and alcohol abuse. The parties finally separated in January 2006. They sold the marital residence and each purchased a new home in Wilson County.

On January 13, 2006, Wife filed a complaint for divorce in the Circuit Court for Wilson County, alleging grounds of irreconcilable differences, inappropriate marital conduct, and adultery. Wife sought, *inter alia*, alimony, division of the marital property, to be designated as the primary residential parent of the parties’ minor children, and reasonable attorney’s fees.

Husband filed an answer on March 9, 2006, admitting irreconcilable differences but denying inappropriate marital conduct and adultery. Husband also counterclaimed for divorce, asserting inappropriate marital conduct by Wife.

The marital residence was sold, yielding proceeds of approximately \$208,000. The proceeds were distributed to enable both parties to purchase a new residence, allocating \$68,000 to Husband and \$104,000 to Wife. The remainder of the proceeds were disbursed to Husband to pay the debts of the Twin Oaks Cattle Company.

Prior to trial, the parties submitted proposed parenting schedules for their youngest child, Austin, who was eleven years old at the time of trial. In his work as a pilot, Husband “bids” his schedule each month, requesting days off to accommodate his needs or the family’s schedule. In light of his considerable seniority, Husband usually, but not always, receives his requested days off.

He proposed a parenting schedule under which he would receive fifteen residential parenting days of his choosing with Austin. Wife proposed a parenting schedule under which Husband would exercise residential parenting time every other weekend from Friday evening until Sunday morning and two nights every other week consistent with Husband's work schedule. This schedule would give Husband approximately eight residential parenting days per month.

The trial was held over the course of four non-consecutive days during the months of October and November 2006 and March 2007.¹ On the first day of trial, the parties announced to the court that they had reached an agreement as to the division of the marital property. Under the terms of the agreement, set forth in a consent order filed on October 12, 2006, Husband would receive the Rollover Portion of his Northwest Airlines Retirement, the Fidelity account, and the Janus Mutual Fund, for a total value of approximately \$58,600, as his separate property. Wife would receive as her separate property her retirement from Elmcroft Assisted Living, valued at approximately \$7,500. Wife would also receive a total of \$105,000 as compensation for her interest in the parties' property in Minnesota and for her interest in the Twin Oaks Cattle Company. A portion of those proceeds would be used to pay the outstanding indebtedness on Wife's vehicle, and Husband would keep his vehicle. Wife would receive approximately \$235,000 of Husband's retirement account with Northwest Airlines. Husband agreed to contribute \$15,000 toward a college fund for Austin. The order also provided that the proceeds that each party received from the sale of the marital residence would be their separate property, and that the residences that each party had purchased during their separation were their separate property as well. In all, Wife received in excess of \$440,000 as her share of the marital property.

Wife testified on the first day of trial. At the time of trial, Wife was forty-one years old. To establish grounds for divorce, Wife described Husband's excessive use of alcohol, and accused him of being verbally and physically abusive while drunk. Wife described an incident over five years earlier in which Husband allegedly drove home while intoxicated with Austin in the car with him. Wife also accused Husband of episodic adultery.

Wife testified that she had been the primary caretaker of the children since their birth. She said that she took care of everything, bathing the children, doing their laundry, attending to their medical needs, and helping them with their homework, even when Husband was not away working.

Wife admitted that Husband and their youngest child, Austin, have a good relationship. Nevertheless, she expressed reservations about having Austin spend too much time with his father at any one time, testifying that an overnight stay of only one or two nights at a time "seems to be emotionally easier on Austin." Wife proposed that Husband have no more than twelve days each month with Austin, stressing the need for stability in Austin's schedule. Commenting on Husband's proposal that he be given fifteen days per month of residential time with Austin and the unfettered ability to choose those days, Wife testified that such a schedule would provide Austin with no

¹ Christopher turned eighteen a few months after the filing of the complaint. At the time the divorce trial began, Ashlyn was almost eighteen, and Austin was eleven years old.

structure or stability and would be unworkable. Wife admitted that the family had to be somewhat flexible concerning the parenting schedule because Husband's schedule fluctuates. Wife said, "I think each month is going to have to be different. That's just the way his schedule is. It's going to have to be flexible to some extent." She conceded that Austin was accustomed to his father's irregular schedule, but said that Austin had difficulty adjusting to a parenting schedule that included long intervals of time at his father's home. She maintained that she needed to have the ability to make longer term plans for the children, and stressed Austin's need for consistency, structure, and stability, and asked for a definitive parenting plan around which she could base a schedule.

After describing her educational background, Wife outlined her work history. Wife testified that, although she has worked for the majority of the years in which the parties were married, when the two oldest children were young, she stayed home for several years with them. When she returned to work, she worked part-time until her youngest son reached the age of four or five, at which time she began working full-time.

Wife then described the income she had earned in recent years. She claimed that she had not been able to locate the parties' 2002 and 2003 income tax returns, but estimated that her 2002 gross income was approximately \$28,000 and her 2003 gross income was approximately \$37,000. In 2004, Wife worked at Elmcroft Assisted Living, and also began working as a contract employee for Cracker Barrel, doing event planning. Her 2004 gross income was \$18,889, an average of \$1,574 per month. In 2005, she continued the contract work with Cracker Barrel and began doing contract work with the Nashville Sounds as well. Her 2005 gross income was approximately \$30,055, an average of approximately \$2,504 per month. In 2006, when Wife filed the complaint for divorce, she was still doing contract work for Cracker Barrel. Her W-2 indicated that she earned \$9,589 from her contract work at Cracker Barrel in 2006. She testified that she left her employment as a contract worker at Cracker Barrel and, since May 22, 2006, she had been employed with Homewood Suites as a director of sales, earning a gross income of \$1,846 per month.

Wife initially testified that she had expenses of approximately \$4,296 per month, and a net income of \$1,742 per month, leaving a shortfall of \$2,554 per month. Based on these figures, she sought alimony in the amount of \$2,500 per month for fifteen to twenty years. She later said that, in light of the property settlement, her expenses would no longer include a \$300 per month car payment, and she thought she could reduce her mortgage payment by \$450 per month by refinancing. Her grocery expenses would also decrease because oldest son Christopher no longer lived with her and Austin would spend substantial time at Husband's home. This left a shortfall of less than \$1800 per month.

On the last day of trial, Wife testified that she was fired from her job at Homewood Suites in February 2007. She was willing to stipulate, however, that she had the capacity to earn \$1,850 per month, consistent with the salary she had been earning at Homewood Suites. At the time of her testimony, she had not yet secured alternate employment. She had, however, refinanced her mortgage and she was paying approximately \$300 less per month.

Husband presented testimony from a vocational expert, Rebecca Williams (“Williams”). Williams testified concerning Wife’s earning capacity. Using Wife’s deposition testimony and her discovery responses, Williams identified Wife’s transferable skills and attempted to ascertain potential job opportunities for her. Williams testified that Wife’s employment history indicated a high level of creativity, communication skills, and ability to assure customer satisfaction. She said that Wife was qualified to work in advertising, marketing, public relations, and sales management. Williams also testified that, in middle Tennessee, the annual median wages for marketing managers was \$61,370; for sales managers it was \$67,740, and for public relations managers it was \$55,190. Williams opined that Wife should be able to earn between \$48,000 and \$58,000 per year.

Husband testified as well. At the time of trial, Husband was forty-six years old. As grounds for divorce, Husband testified about Wife’s repeated threats to leave him, her untruthfulness, and occasions on which Wife concealed from him information about their daughter Ashlyn dating a man several years older than her.

Husband testified about his employment and his recent income history. As a pilot at Northwest Airlines, Husband said, he is a captain and has reached the maximum salary level at Northwest. He testified that his 2005 and 2006 gross income from Northwest was \$155,009 and \$124,726, respectively. Husband testified that he has experienced recent pay cuts because Northwest was in bankruptcy. He also testified that he believed that his 2007 income would be less than his 2006 income.

At the time of trial, Husband had a monthly gross income of \$11,053. After tax and other automatic deductions for insurance, retirement, and union dues, his net income was \$7,481 per month. He then testified that his other expenses totaled \$9,289 per month. This figure included expenses for his home mortgage and utilities, as well as the mortgage and expenses for the Minnesota property. It also included debt repayment, including Wife’s car payment, and general expenses for himself and his three children. This left Husband with a monthly deficit of approximately \$1,800. Based on these figures, Husband asserted that he did not have the ability to pay alimony. Husband later conceded that his expenses were less than he had claimed because they included all three of his children. The expenses for Ashlyn and Austin, however, should not have been included because Ashlyn spent little time with him and his child support payments covered Austin’s expenses. Also, the \$263 monthly car payment for Wife was no longer an expense because the indebtedness on Wife’s car was satisfied in the property settlement.

Husband agreed with Wife’s assertion that she stayed out of the workforce at times to care for the children when they were young, but he insisted that the primary reason that she wanted to stay home was because she did not want to work outside the home. He conceded that she ceased working by agreement of the parties because he thought that it was in the children’s best interest for Wife to stay home to care for them. Husband agreed that Wife bore the majority of the responsibility for caring for the children when he was gone working, but denied that she was the primary caregiver when he was not away working.

Husband then testified about his relationship with the children and the parenting schedules proposed by both parties. Husband acknowledged that daughter Ashlyn, age seventeen, was very close to Wife and that his relationship with Ashlyn was strained. Husband stated his belief that Wife interfered with his relationship with Ashlyn, noting that Ashlyn's criticisms of him sometimes echoed Wife's. Husband testified that he wanted to have one-hundred residential parenting days with Ashlyn per year.²

In contrast, Husband said that his relationship with eleven-year-old Austin was good. During the summer of 2006, before the divorce trial, Husband had fifteen days per month of residential parenting time with Austin. During that time, Husband said, Austin helped him with the cattle business, they played golf and baseball, they went on several trips, and overall had a good time together. Husband testified that the order giving him equal time during the summer worked well.

Before the temporary order was implemented giving him equal time, Husband said, Wife attempted to deny him parenting time with Austin. In October and November, he claimed, Wife refused to inform him of her schedule so that he could consider it in bidding for his days off. He also said that Wife interfered with his residential parenting time with Austin by calling Austin "five times a day" while he was at Husband's home. Husband admitted, however, that at the time of trial, he had not provided Wife with his April 2007 schedule that came out on March 16 because the parties had an argument when Husband went to Wife's home to give her the schedule. He conceded that he had neither mailed nor faxed her his schedule.

Husband testified that he wanted to be designated the primary residential parent for Austin, and wanted to continue the schedule from the summer, which gave him fifteen residential days per month with Austin. Husband testified that he takes everyone's schedule into consideration when he bids for his days off, and that he gets his requested schedule about ninety to ninety-five percent of the time. Husband testified that Wife's proposed parenting plan, giving Husband residential parenting time with Austin only every other weekend and predetermined days during the week, would not work with his schedule. He explained that, for example, if he bid to have a Monday off in order to attend Austin's Monday football game, he may have to work the preceding weekend in order to have Monday off. Under Wife's proposal, this would mean he would have to choose between residential parenting time or attending special activities. Husband felt certain that his proposed parenting plan would not be disruptive to Austin because Austin was accustomed to his irregular schedule.

The trial court heard testimony from the parties' seventeen-year-old daughter, Ashlyn Floyd. Ashlyn characterized her mother as her "best friend" and said that she would prefer not to visit her father. She described an occasion on which she smelled alcohol on her father's breath and felt scared. Ashlyn admitted that her father had never physically abused her but she said that he had emotionally abused her by getting in her face and calling her irresponsible.

² The trial court ordered that Husband was entitled to six days of residential parenting time with Ashlyn each month. Ashlyn has since turned eighteen and Husband's residential parenting time with her is not an issue in this appeal.

Ashlyn testified that she and Austin have a close relationship, and that Austin and their mother are also close. Ashlyn described Wife helping Austin with his homework, Wife taking Austin and his friends to activities, and she, Wife, and Austin watching television at home together. She stated her opinion that Austin was content living with their mother, and that he looked unhappy when he had to leave to visit his father. Ashlyn denied talking to Austin about their father's drinking, and denied making him feel unsafe to be around their father, but she admitted she had talked about their father's drinking in front of Austin.

The trial court heard testimony from eleven-year-old Austin Floyd as well. Austin testified that, when he is with his father, they play sports such as golf and tennis, and also work on the farm. When he is with his mother, they play miniature golf and go to movies, and she helps him with homework. Austin testified that he has a room in each parent's home, and that although moving between his parents' homes was sometimes confusing, it was not too much so. Austin said that his brother Christopher was mostly at their mother's home when he was not away at college, and he saw Christopher on weekends. Austin said that he and Ashlyn get along well, and he enjoys being with her, but she is seldom at their father's home.

Austin expressed concern about spending too much time with Husband, explaining that his father drinks beer when Austin is at his father's house and he is afraid that his father might get drunk. Austin said, however, that he had never seen his father drunk. Although he had no problems with either parent that he needed to tell the court, Austin said that he gets along better with his mother. He said that there are fewer rules when he is with his mother, and he perceived his father to be more of a disciplinarian.

When asked about his preference regarding spending time with his father, Austin testified that he wanted to spend approximately six days with his father each month and spend the rest of the month with his mother. Initially, he said that he wanted the six days to be consecutive. He later corrected his request, saying that he preferred for the six days with his father to be split up into intervals of two to three days. Austin said that he liked spending time with both parents and did not want to have to choose between them. When asked, Austin testified that he did not believe that he had spent too much time with his father during the summer when he stayed with his father fifteen days per month, and that he did not feel at that time that he was away from his mother too much. He was definite, however, in his expressed preference to spend six days per month at his father's home, in intervals of two to three days:

Q: . . . Judge Byrd just asked you if the current schedule has been working okay, and you said it had. I think your father has been spending about 12 days with you per month.

A: Yes.

Q. . . . You've got to tell the Court. I can't do that. Do you want to spend what you've been spending with your father, which is about 12 days per month, or do you want to spend just six days per month? What is your choice?

A: Six.

Q: So you've been spending about 12, give or take, maybe a little more, maybe a little less?

A: Yes.

Q: Would you want to spend it in what's called one period, one consecutive six days back to back so it's just one week minus a day once a month, and that's it, or would you rather break it up into two or three days periods so you see him more often during the month or for shorter periods of time?

A: Break it up.

Q: All right. And how many days at a time?

A: Two or three.

Q: Like kind of a long weekend?

A: Yes.

Q: So we're talking about a total of six days.

A: Yes.

Q: Has anyone suggested to you to tell the Court this?

A: No.

Q: This is just what you want to do?

A: Yes.

* * *

Q: And you're certain about that?

A: Yes.

Austin indicated, however, that he wanted the opportunity to spend extra time with his father in the event that there was a special activity to attend.

The trial court then issued its ruling from the bench. Wife was designated as the primary residential parent. The trial court ordered that Husband would have residential parenting time with Austin for twelve days each month, with the days to be chosen by Husband in his discretion based on his work schedule. The trial court stated that it placed the selection of parenting days in Husband's discretion because of his work schedule as a pilot. The trial court did not explain its reasoning for disregarding the child's stated preference as to the number of days to be spent with each parent.

The trial court found that Husband's income was \$10,393 per month for the purpose of determining child support, inclusive of credits for medical insurance and private school tuition. Because Wife had testified that she could not locate her tax information, she was ordered to immediately provide her W-2 information to determine her income for the purposes of calculating child support, but the trial court stated that the amount would not be below the \$1,850 gross monthly income that Wife testified that she earned at Homewood Suites.

The trial court then addressed Wife's request for alimony. Based on the amount that Husband would be paying in child support, toward private school tuition, and Husband's income and expenses, the trial court found that Husband did not have the ability to pay Wife alimony. Although

Wife's monthly expenses exceeded her monthly income, the trial court found that the difference was small and, considering her earning capacity and the amount she received in the distribution of marital property, it determined that she did not need alimony.

The trial court then declared both parties to be divorced. Each party was ordered to pay his or her own attorney's fees.

The divorce decree and the permanent parenting plan were filed on April 24, 2007. The permanent parenting plan set Husband's presumptive child support obligation at \$1,373, but with a private school tuition deviation of \$514, the final child support order required Husband to pay \$858 per month.

Wife filed a motion to alter or amend. As to Husband's residential parenting time with Austin, Wife asked the trial court to amend the order to prohibit Husband from choosing his twelve days per month in such a way as to take precedence over Wife's specifically granted holidays. Wife also asked for a recalculation of Husband's child support obligation, to omit the credit for the private school tuition payment. She also contended that the trial court erred in denying her request for alimony, arguing that Husband would have the ability to pay alimony if he received a tuition credit in his child support obligation.

Meanwhile, Husband filed a motion for contempt. Husband contended that Wife failed to timely provide him with her 2006 W-2s as required by the trial court's order, and then, when she finally did so, he learned that in 2006 she actually earned approximately \$39,128, not the \$22,153 that she testified she earned. Husband later amended his motion to ask the trial court to further find Wife in contempt for claiming Ashlyn as a dependent on her 2006 tax return in violation of the trial court's order. He also asked the trial court to modify the child support order to reflect Wife's actual income.

In an order filed October 15, 2007, the trial court found that Wife committed perjury and fraud upon the court by misrepresenting her 2006 income. It also found that Wife failed to comply with the trial court's order by claiming Ashlyn as a dependent on her 2006 income tax return. In addressing the parties' other requests, the trial court granted Wife's motion to alter or amend the permanent parenting plan to reflect that Husband's time with Austin should not supersede Wife's holidays. The trial court also ordered the parties to pay the private school tuition on a pro rata basis, and ordered that the child support obligations be recalculated using Wife's actual 2006 income. The trial court denied Wife's request to alter or amend with respect to her claim for alimony. On October 17, 2007, Wife filed a timely notice of appeal.

ANALYSIS

On appeal, Wife raises four issues:

1. Whether the trial court erred in not awarding Wife alimony?

2. Whether the trial court erred in allowing Husband the discretion to select the twelve days of residential parenting time that he would exercise each month with his minor child?
3. Whether the trial court erred in denying Wife's Rule 60.02 motion to amend the order distributing the marital estate and in not hearing an offer of proof on the issue?
4. Whether the trial court erred in not awarding Wife attorney's fees?

Because this case was tried by the trial court sitting without a jury, we review the trial court's findings of fact *de novo* upon the record with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); **Bogan v. Bogan**, 60 S.W.3d 721, 727 (Tenn. 2001) (citations omitted). Questions of law are reviewed *de novo* with no presumption of correctness. **S. Constructors, Inc. v. Loudon County Bd. of Educ.**, 58 S.W.3d 706, 710 (Tenn. 2001) (citations omitted).

Residential Parenting Time

We address first Wife's argument that the trial court erred by allowing Husband to choose the twelve days of residential parenting time that he would exercise with Austin each month. Wife argues that it would be in Austin's best interest to have a residential parenting schedule that designates the days that Husband would exercise with Austin. The permanent parenting plan currently gives Husband twelve days per month to exercise at his discretion. Wife argues that Husband is usually able to get the days off that he requests, making it possible for him to have a reasonably consistent schedule, and that the current arrangement prevents her from making definitive plans with Austin because she does not know Husband's schedule until the month before Husband is to exercise his residential time. She notes that, if Husband is given complete discretion to select his residential parenting schedule each month, Husband will always have priority for important dates or events, such as birthdays, graduations, and extracurricular activities. Wife argues that she and Husband do not get along well enough to cooperate in fashioning a schedule that is convenient for everyone.

The trial court has broad discretion when making decisions regarding the determination of a parent's residential parenting time. **Eldridge v. Eldridge**, 42 S.W.3d 82, 85 (Tenn. 2001) (citation omitted). The best interest of the child is the paramount concern. **Whitaker v. Whitaker**, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997) (citation omitted); Tenn. Code Ann. § 36-6-106 (2005 & Supp. 2008). The determination of a child's best interest turns on the particular facts of each case. **See Taylor v. Taylor**, 849 S.W.2d 319, 326 (Tenn. 1993) (citation omitted); **In re Parsons**, 914 S.W.2d 889, 893 (Tenn. Ct. App. 1995) (citation omitted). Because the trial court has the benefit of observing the demeanor of the two parents and the other witnesses, it is given wide discretion in determining such matters. **Mayberry v. Mayberry**, No. M2002-00424-COA-R3-CV, 2003 WL 21392193, at *2 (Tenn. Ct. App. June 17, 2003) (citation omitted). Therefore, "[i]t is not the function of appellate courts to tweak a [parenting plan] in the hopes of achieving a more reasonable result than the trial court." **Eldridge**, 42 S.W.3d at 88.

The trial court explained its decision to give Husband the discretion to select his residential parenting days with Austin by saying, “It’s because he’s the only one that knows. . . . [H]e can bid for days, but he doesn’t have control, absolute control over his schedule. Basically, you’re at the mercy of the airlines.” Indeed, Wife admitted at trial that Husband’s schedule required all parties to be flexible. Wife argues that, because of his seniority with the airlines, Husband receives his requested days off approximately ninety percent of the time, and, therefore, could achieve a predetermined residential schedule. In his testimony, Husband responded to this argument by stating that he attempts to fashion his schedule around Austin’s activities, and that he often cannot get weekends off if he wants to be off during the week to attend Austin’s events.

Despite Husband’s breezy assurances that Austin had no problems with his fluctuating schedule because he grew up with it, Wife rightly points out that Husband’s varying schedule deprives Austin of the consistency, predictability, and structure that is best for any child Austin’s age. Ideally, the parties would cooperate for the benefit of the child, to achieve as much structure and consistency as possible and still allow Husband to have substantial parenting time and full participation in important activities and events. Alas, this was not an option for the trial court. Wife forthrightly acknowledges that the parties have been unable to cooperate to fashion such a schedule, and Husband agrees. The trial court, then, was left with the choice of either imposing a schedule that provided Austin structure but could foreclose Husband from meaningful participation as a parent, or entrust Husband with the discretion to fashion a workable parenting schedule.

Wife correctly points out that the parenting plan ordered by the trial court permits Husband to select a schedule that ignores his son’s best interest or prevents Wife from sharing residential parenting time for Austin’s extracurricular activities or important events. This is true. With the discretion given to Husband by the trial court comes the solemn responsibility to exercise it wisely and selflessly. In a divorce, the residential parenting schedule ordered by the court is primarily for the benefit of the *child*, not the parents. While it must have been difficult for Husband to learn that his son had stated to the judge a preference for limitations on his time with Husband, it was undoubtedly more difficult for an eleven-year-old boy to articulate those feelings to a judge in a trial setting. Husband would be wise to respect the child’s needs and preferences. If Husband selects a residential parenting schedule that excludes or marginalizes Wife with respect to Austin’s activities, or Husband fails to prioritize Austin’s needs over his own, this could be reason for modification of the parenting plan in the future. However, unless and until this occurs, we cannot say that the trial court abused its discretion in allowing Husband to choose his residential parenting days.

Division of Marital Property

Next, we address Wife’s argument that the trial court erred when it denied her Rule 60.02 motion to alter or amend the order distributing the parties’ marital estate. Wife argues that the trial court should have granted her motion to alter or amend because she mistakenly believed that the parties’ interest in their Minnesota property was half of what it actually was, resulting in an inequitable agreement. Wife also argues that the trial court erred in refusing to allow her to put on an offer of proof concerning the value of the property. She argues that by not permitting her to make

an offer of proof the trial court improperly ruled on the motion based solely on Husband's evidence. She also argues that the trial court based its ruling on an improper standard because the trial court based its ruling on its determination that the agreement was equitable, rather than on a determination that Wife was mistaken as to her interest in the property.

The trial court has broad discretion in determining whether to grant a Rule 60.02 motion³, and an appellate court will not reverse such a decision unless it is clear that the trial court abused its discretion. *Thompson v. Chafetz*, 164 S.W.3d 571, 574 (Tenn. Ct. App. 2004) (citations omitted). There is no abuse of discretion unless the trial court "has 'applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003) (quoting *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002)).

In this case, the trial court stated that it would decline to set aside the marital property agreement because Wife "had full access to all . . . information at least two weeks prior to trial." *See Day v. Day*, No. M2001-01624-COA-R9-CV, 2002 WL 13036, at *7 (Tenn. Ct. App. Jan. 4, 2004). In addition, the court stated, the parties "had plenty of time to think [of] what a good settlement is, and they decided that day, and . . . I don't see any good faith reason to set it aside." It also found that Wife's mistake regarding the value of the Minnesota property was not justified. The fact that Wife may have been "mistaken" in calculating the value of her interest in the Minnesota property, however, does not automatically entitle her to relief. "As a prerequisite to the extraordinary relief available under Rule 60.02(1), the movant is required to set forth . . . facts explaining why the movant was justified in failing to avoid mistake, inadvertence, surprise or neglect." *Travis v. City of Murfreesboro*, 686 S.W.2d 68, 69 (Tenn. 1985) (citing *Hopkins v. Hopkins*, 572 S.W.2d 639, 640 (Tenn. 1978)). Moreover, quite apart from Wife's alleged mistake, the trial court found that the marital property agreement was equitable. Under all of these circumstances, we cannot conclude that the trial court's denial of Wife's Rule 60.02 motion was an abuse of discretion.

We also find that Wife's argument that the trial court erred by refusing to allow an offer of proof is without merit. The record does not support Wife's contention that the trial court refused to allow her to make an offer of proof. The trial court originally told Wife that an offer of proof could be made after court had adjourned for the day because the offer of proof was for the purposes of appeal and not for evidentiary purposes. When Wife indicated a preference for the judge to be present for the offer, the trial court told the parties that the offer could be made at a later time. Wife never again brought the issue to the trial court's attention. The burden of proof is on the moving party to demonstrate the facts that entitle her to relief under Rule 60.02. *Holt v. Holt*, 751 S.W.2d 426, 428 (Tenn. Ct. App. 1988) (citation omitted). Therefore, we affirm the trial court's denial of Wife's Rule 60.02 motion.

³ Rule 60.02 provides in part: "On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect. Tenn. R. Civ. P. 60.02."

Alimony

We now turn to Wife's argument that the trial court erred by denying her claim for alimony. Wife disputes the trial court's findings that she does not need alimony and that Husband is unable to pay, and she argues that she is entitled to rehabilitative alimony or, in the alternative, alimony *in futuro*. Because alimony decisions are very fact-intensive, trial courts have broad discretion when determining whether an award of alimony is appropriate. *Bilyeu v. Bilyeu*, 196 S.W.3d 131, 135 (Tenn. Ct. App. 2005) (citations omitted). Appellate courts are, therefore, reluctant to second guess a trial court's decision regarding alimony "unless it is not supported by the evidence or is contrary to public policy." *Id.* (citing *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994)). In determining whether an award of alimony is appropriate, the trial court must consider the factors outlined in Tennessee Code Annotated § 36-5-121(i). The two most important factors are the disadvantaged spouse's need and the obligor spouse's ability to pay. *Avaritt v. Avaritt*, No. M2007-01804-COA-R3-CV, 2008 WL 4072087, at *2 (Tenn. Ct. App. Aug. 28, 2008) (citing *Oakes v. Oakes*, 235 S.W.3d 152, 160 (Tenn. Ct. App. 2007)).

Wife argues that the trial court based its denial of her request for alimony, in part, on the division of the marital property, which she argues is inequitable because of her mistaken calculation regarding the value of the Minnesota property. Wife also argues that the trial court's denial of her request for alimony was premised on a child support payment from Husband of \$1,554 per month; however, Husband's actual child support ended up being \$668 per month, once their daughter Ashlyn turned eighteen shortly after trial. This changed Husband's outflow and also changed the monies coming into Wife's household. Therefore, Wife's net income, including child support, became \$2,410 per month. Considered with her expenses in excess of \$3,000, Wife claims that she has a monthly deficiency of approximately \$900. She maintains that Husband can afford to pay child support, his pro rata portion of the tuition, and alimony, and that she needs alimony.

In the property settlement agreement, Wife received \$36,000 more than Husband in the distribution of the proceeds from the sale of the parties' marital residence. Moreover, under the terms of the settlement, Husband was obligated to fund a \$15,000 college fund for Austin. In all, Wife received over \$440,000 as her share of the marital property. As noted above, we found that the trial court did not err with regard to the division of marital property.

In addition, Wife's argument that she has a \$900 per month deficiency is based on a net income of \$1,742 per month, rather than the higher income that the trial court found Wife actually earned in 2006. The trial court determined that based on her 2006 W-2s, Wife actually had a monthly gross income of \$3,260 per month. Although the record does not indicate what Wife's 2006 monthly net income was, it is clear that the deficiency is not the \$900 that Wife asks this Court to consider. Under all of these circumstances, we cannot find that the trial court erred in finding that Wife is not in need of alimony.

In regard to Husband's ability to pay alimony, Wife points to the fact that Husband's child support order is actually \$668, not \$1,554, as referenced by the trial court in its ruling, as evidence

that Husband can afford to pay alimony. Wife also argues that over \$900 of Husband's payroll deductions go to fund his optional retirement account, and that amount is not an expense, but rather should be considered as money from which Husband could pay her alimony.

We have carefully reviewed the record as to Husband's expenses. Even with the adjustments advocated by Wife, Husband still faces a monthly deficit. Consequently, we find no error in the trial court's finding that Husband could not afford to pay alimony.

Based on the finding that Wife did not need alimony, that Husband could not afford to pay, and on Wife's share of the marital property, the trial court denied Wife's claim for alimony. Under all of these circumstances, we must conclude that the trial court did not abuse its discretion in denying Wife's claim for alimony.

Attorney's Fees

Finally, Wife argues that the trial court erred in denying her request for attorney's fees. The trial court's decision regarding an award of attorney's fees will be reversed on appeal only if the trial court abused its discretion. **Owens v. Owens**, 241 S.W.3d 478, 496 (Tenn. Ct. App. 2007) (citing **Aaron v. Aaron**, 909 S.W.2d 408, 411 (Tenn. 1995); **Eldridge v. Eldridge**, 137 S.W.3d 1, 25 (Tenn. Ct. App. 2002)). A trial court abuses its discretion when "its decision is not supported by the evidence, when it applies an incorrect legal standard, [or] when it reaches a decision which is against logic or reasoning that causes an injustice to the party complaining." *Id.* (citing **Biscan v. Brown**, 160 S.W.3d 462, 468 (Tenn. 2005)).

An award of attorney's fees usually takes the form of an award of alimony *in solido*. *Id.* at 495 (citing **Yount v. Yount**, 91 S.W.3d 777, 783 (Tenn. Ct. App. 2002)). "Accordingly, a trial court considering a request for attorney's fees must consider the factors contained in [Tennessee Code Annotated] § 36-5-121(i), with the most important factors being the need of the economically disadvantaged spouse and the ability of the obligor spouse to pay." *Id.* at 496 (citing **Eldridge**, 137 S.W.3d at 24-25; **Miller v. Miller**, 81 S.W.3d 771, 775 (Tenn. Ct. App. 2001)). "It is considered most appropriate where the final decree of divorce does not provide the obligee spouse with a source of funds, such as from property division or alimony in solido, with which to pay his or her attorney." **Yount**, 91 S.W.3d at 783 (citing **Houghland v. Houghland**, 844 S.W.2d 619 (Tenn. Ct. App. 1992)).

When the trial court issued its oral ruling, it explained its reason for ordering the parties to pay their own attorney's fees. The trial court stated, "And the property was divided even or pretty much even, so each will have to pay their own attorney's fees." Wife argues that this language indicates that the trial court applied the improper legal standard in making its determination. We disagree.

One of the stated factors for a court to consider in deciding whether to award attorney's fees is "[t]he provisions made with regard to the marital property." T.C.A. § 36-5-121(i)(8) (2005). It is clear that the trial court considered this factor in making its decision. Under all of the

circumstances in this case, we cannot conclude that the trial court abused its discretion in denying Wife's request for attorney's fees. Therefore, the trial court is affirmed on this issue.

CONCLUSION

The decision of the trial court is affirmed. The costs of this appeal are taxed to the appellant, Jill Michelle Floyd, and her surety, for which execution may issue if necessary.

HOLLY M. KIRBY, JUDGE